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# Supreme Court of the United States

**OCTOBER TERM, 1942**

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**No. 296**

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HATTIE MAE TILLER, EXECUTOR OF THE ESTATE OF JOHN LEWIS TILLER, DECEASED,

*Petitioner,*

*vs.*

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION,

*Respondent.*

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## BRIEF FOR PETITIONER.

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*Counsel for Petitioner.*

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## BRIEF FOR PETITIONER.

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### I.

### Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals, Fourth Circuit (R. 69), is reported in 128 F. (2d) 420. The District Court of the United States for the Eastern District of Virginia did not deliver a written opinion. The directed verdict of the Court appears in the Record on page 63 and its judgment on page 66.

## II.

### Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended; U. S. C. Title 28, Sec. 347(a). The judgment of the United States Circuit Court of Appeals, Fourth Circuit, to be reviewed, was entered on May 19, 1942 (R. 77).

## III.

### Statement of the Case.

The decedent, John L. Tiller, a sergeant of police in the employ of Atlantic Coast Line Railroad Company, was fatally injured while on duty about 7:00 P. M. on the evening of March 20, 1940, when he was struck by a railroad car in the Clopton Yard of the railroad company south of Richmond, Virginia (R. 64, 65). Action for damages was instituted by decedent's executor under the Federal Employers' Liability Act in the District Court of the United States for the Eastern District of Virginia; at the conclusion of plaintiff's evidence, the District Court directed the jury to return a verdict for the defendant (R. 63). On appeal, the Circuit Court of Appeals for the Fourth Circuit affirmed the judgment of the said District Court (R. 77). The facts are as follows:

The respondent carrier operates each evening a freight train from Richmond to the south, in two sections (R. 39). Cars from north of Richmond are assembled at the Acca Yard of the Richmond, Fredericksburg and Potomac Railroad and brought to Clopton Yard by

a road engine (R. 17). Richmond cars are assembled at Byrd Street Station of the carrier and are brought thence to Clopton Yard (R. 39). These cars arrive at Clopton Yard about the same time and are there assembled for further transportation in such order that they may be conveniently dropped off at divers southern points (R. 40).

The aerial photograph (Plaintiff's Ex. No. 2) shows the physical features of Clopton Yard. Running through Clopton Yard from east to west is Clopton Road, a public highway (R. 26, 53, 56). Coming from the north of Clopton Road are three parallel tracks running north and south and crossing Clopton Road at right angles, of which the easternmost is the northbound main line, the center the southbound main line, and the westernmost is known as slow siding (R. 26, 27). Coming in from the northwest are the tracks from Acca which also cross Clopton Road to the west of slow siding and connect with slow siding south of the road (R. 19).

The decedent, Tiller, had been in the employ of the railroad for sixteen years and was familiar with the layout of tracks and operation of trains in Clopton Yard (R. 14, 60, 61). He followed no regular routine in performing his assigned duties of policing the trains (R. 60), but he usually stood somewhere near Clopton Road crossing to check the seals on cars as they passed southwardly on the southbound main line (R. 26, 35, 36). The rules of the railroad require workers in yards to look out for their own safety and no warnings of switching or other movements of the trains are given them (R. 60).

On the night in question the cars from Acca came into Clopton Yard from the northwest, and the engineer was instructed to cut off three cars, go southwardly across Clopton Road until he reached slow siding, then

to back up slow siding northwardly. These movements were made (R. 18, 19, 20). In the meantime, the cars from Byrd Street Station had come south on the southbound main line and were moving southwardly while the back-up movement on slow siding was in progress (R. 20). The distance between the western rail of the southbound main line track and the eastern rail of slow siding was 7 feet, 11½ inches, which was reduced to 3 feet, 7½ inches by the overhang of the cars moving in opposite directions (R. 45).

No one saw Tiller at the point of the accident before he was struck, but as found by the Circuit Court of Appeals (R. 71) it is evident that he was standing just north of Clopton Road on slow siding, or between slow siding and the southbound main line, facing eastwardly and with his flashlight inspecting the seals on the cars moving southwardly on the southbound main line (Plaintiff's Ex. No. 3, R. 64). As he was thus engaged, he was struck by the head car of the northbound back-up movement on slow siding (R. 64). His lighted flashlight was found a few feet north of Clopton Road, his cap and his pistol at intervals a few feet further north, and finally he was found under the wheels on the east side of the rear end of the head car (R. 22, 57).

The night was dark and there were no street lights, flood lights or artificial lights of any kind at or near Clopton Road crossing or in that part of Clopton Yard (R. 24).

The brakeman on the head car of the back-up movement was riding on its west side near the end holding a lantern with which he gave signals to the engineer as they approached Clopton Road, but it was his duty to look out for traffic from the west on Clopton Road and he did not see Tiller who was standing to the east of the back-up movement and facing eastwardly (R. 21, 29, 30,

53, 54, 64). The brakeman got off at or near Clopton Road and went back southwardly while his train continued on northwardly (R. 21). There were no lights on the head of the back-up movement, and the only light on the rear of the backing locomotive was a small electric bulb on the tender (R. 50). The automatic bell on the locomotive three car lengths away was ringing (R. 25), but it is probable Tiller did not hear cars approaching on slow siding from the south because of the noise of the southbound main line movement (R. 72).

The engineer knew that it was Tiller's duty to check the cars and that in doing so he usually stood at or near the point where he was on this occasion (R. 26). The engineer, fireman and brakeman all testified that they had never before made or seen a back-up movement northwardly on slow siding (R. 24, 49, 58). The movement on this occasion was necessitated by an error in the classification of cars at Byrd Street Station (R. 19, 36). Another employee infers that the movement was an unusual one (R. 41).

## IV.

### Questions Presented.

1. Whether in an action under the Federal Employers' Liability Act of April 22, 1908, as amended by the Act of August 11, 1939, by the executor of a deceased railroad employee against the railroad for damages for his death resulting from fatal injuries sustained by him while working in the railroad's yard, there was sufficient evidence of negligence on the part of the carrier for the case to be submitted to the jury.

2. Whether by reason of the amendment to the Federal Employers' Liability Act to the effect that in an

action under that Act the employee shall not be held to have assumed the risk of his employer's negligence, the carrier may no longer rely upon the former rule that its employees in railroad yards assume the risk of all usual yard movements and must look out for their own safety, and, therefore, must take precautions for the safety of its employees in its railroad yards commensurate with the dangers involved.

3. Whether there was sufficient evidence of an unusual movement by the train which struck decedent for the case to be submitted to the jury on that issue, the case of an unusual movement, prior to the amendment above referred to, constituting an exception to the former rule.

## V.

### The Statute Involved.

This suit was instituted under the provisions of the Federal Employers' Liability Act of April 22, 1908, Chapter 149, 35 Stat. 65; U. S. C. Title 45, Chapter 2, Sections 51, et seq., as amended by Act of Congress August 11, 1939, Chapter 685, Section 1, 53 Stat. 1404, hereinafter called the Act, and there is no issue as to its applicability.

Sections 1 and 4 of the Act which are pertinent to the issues involved in this case were amended August 11, 1939, to read as follows:

Section 1:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the

District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Section 4:

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

## VI.

## ARGUMENT.

### Summary of Argument.

1. The doctrine of assumption of risk has been abolished in cases arising under the Act by the amendment of August 11, 1939, in any case where injury or death to the employee resulted in whole or in part from the negligence of the carrier or any of its officers, agents or employees. Employee Tiller, therefore, did not assume the risk of negligence of respondent or its employees.

2. The sole question is whether the respondent was negligent. Petitioner's evidence of respondent's negligence was more than sufficient to justify submission of the question to the jury.

3. Respondent was negligent as a matter of law because of its failure to equip its locomotive with proper lights as prescribed by the Federal Boiler Inspection Act and the Rules of the Interstate Commerce Commission adopted pursuant thereto.

4. The unusual movement of the trains in this case renders the respondent liable independently of the amendment to the Act.

### 1. Tiller did not assume the risk of negligence of respondent or its employees.

Prior to the August 11, 1939, amendment to the Act, it was well established that in an action brought thereunder the common law defense of assumption of risk was open to the defendant except where it was shown that the company had violated a Federal statute passed

for the protection of the employee. *Toledo, St. L. & W. R. Co.* v. *Allen,* (1928) 276 U. S. 165; 48 S. Ct. 215; 72 L. Ed. 513.

Under the common law rule a servant assumed the risk of the employer's negligence when the fact of such negligence was known to him, or was so plainly observable that he was presumed to have known of it, and the danger therefrom was appreciated by him. The employer could conduct his business according to his own ideas, although another method would be less dangerous, and if his employee knew the hazards incident to the business in the manner in which it was carried on, and continued in the employment, he "assumed the risk" of the more dangerous method. *Delaware, Lackawanna & Western R. R. Co.* v. *Koske,* (1929) 279 U. S. 7, 49 S. Ct. 202, 73 L. Ed. 578; 18 R. C. L. 677.

State legislatures have long recognized the unfairness of the common law doctrine of assumption of risk and have abolished it by statute. The Congress of the United States, realizing that the application of the doctrine to cases arising under the Act, in the light of modern conditions, cause grave injustices to railroad employees, amended the Act in August, 1939, in an effort to eliminate such injustices.

In report No. 661 of the Senate Committee on the Judiciary of the 76th Congress, 1st Session, of June 22, 1939, Senator Neely explained the purpose of the amendment to Section 4 of the Act as follows:

> "The adoption of the amendment proposed to this section will eliminate some grave injustices to which railroad employees have been subject. Under section 4 of this chapter, as it now reads, no compensation can be obtained for an injury to an employee or for an employee's death caused by unsafe or dangerous conditions, which resulted from the

negligence of the employer, his agents, or servants if the court finds, in the circumstances, that the employee knew, or should have known, of the danger involved.

"The assumption-of-risk doctrine, as originally applied, undoubtedly meant that when a man entered the employ of a master he assumed all the risks that were incident to his employment. If he worked in a shop where machinery was in motion, he was presumed to know that if he were not careful, he would probably be injured or killed. If he worked by the side of a fellow employee, he had ample opportunity to know whether his companion was careful or negligent in the discharge of his duties; and knew what, if any, precautions against his fellow servant's carelessness should be taken. If an appliance were broken or defective, and an employee continued to work with it, he assumed the risk of his action. But such simple doctrines do not apply equitably under the infinite complexities of modern industrial practices when one's fellow servants may be numbered by hundreds or even thousands, and unlimited output and maximum speed are watchwords on every hand. The common-law doctrine of assumption of risk, as applied to the worker in a small factory, cannot be fairly applied to the railroad man, whose services are performed over 150 miles of railroad track, or in a large and congested railroad yard.

"The present rule apparently ignores the fact that the master, and not the servant, has control over the conditions which affect the safety of employees. In justice, the master ought to be held liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances. The existing rule not only permits the employer to be careless about the conditions of his premises but, in effect, places a premium upon his carelessness. He may be negligent in allowing his road, or his yard,

to become littered with debris; the men become acquainted with the fact that the yard, or the road is in a dangerous condition, and having knowledge of that fact and continuing to work in spite of that knowledge, if injured, they are held to have assumed the risk, notwithstanding the fact that they have no control over the matter and that the condition was created solely by the negligence of the employer.

"An exceptionally harsh feature of the rule lies in the fact that if an employee knows of an unsafe condition, and complains about it, he is held to have the choice of continuing to work and assuming the risk, or quitting his employment and seeking a livelihood elsewhere.

"In the case of *Hallstein* v. *P. R. R.* (30 Fed. (2d) 594 (1929)), in holding that the plaintiff could not recover for an injury due to the failure of an employer to furnish a safety belt upon request, the court said:

" 'Knowing the situation, he preferred to take the risk of injury rather than to quit his employment, and this choice was voluntary, albeit, collaterally influenced by economic need.'

"Under present economic conditions, employees must, of necessity, continue to work under unsafe conditions or frequently sacrifice the fruits of many years of accumulated seniority, go on relief, or beg their bread.

"The adoption of this proposed amendment will, in cases in which no recovery is now allowed, establish the principle of comparative negligence, which permits the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned.

"Under existing law, if the violation of any safety statute contributes to an injury to an employee, the employer is deprived of a defense although the injury may not have been caused by the

employer's negligence. The proposed amendment preserves this feature of the law. It seems reasonable to provide that in all other cases in which the injury results from the negligence of an employer or fellow servant the doctrine of comparative negligence rather than the outmoded doctrine of assumption of risk should apply."

Counsel for the petitioner contend that the 1939 amendment to Section 4 of the Act was designed to change the then existing law as established by *Aerkfetz* v. *Humphreys,* (1892) 145 U. S. 418, 12 S. Ct. 835, 36 L. Ed. 758; *Ches. & Ohio Ry.* v. *Nixon,* (1926) 271 U. S. 218, 46 S. Ct. 495, 70 L. Ed. 914; *Toledo, St. L. & W. R. R.* v. *Allen,* (1928) 276 U. S. 165, 48 S. Ct. 215, 72 L. Ed. 513; *Delaware L. & W. R. Co.* v. *Koske,* (1929) 279 U. S. 7, 49 S. Ct. 202, 73 L. Ed. 578; and the other Federal Court decisions generally referred to as the railroad yard cases, which were cited and relied upon by the court below.

The rule laid down in those cases and followed by the court below, placing upon yard employees the full burden of looking out for themselves and relieving the carrier of responsibility for the safety of such employees, was adopted by this Court fifty years ago. The rule is completely outmoded today in the light of changed social and economic conditions, and Congress, recognizing the trend of modern legislation, has directed a change by the 1939 amendment to the Act.

In *Wichita Falls & S. R. Co.* v. *Lindley,* (Texas 1940) 143 S. W. (2d) 428 at 431, the Court, in referring to the amendment, said:

"The deliberate use of the language used in the amendment which relieves an employee of assumed risk when injured as a result of the carrier's negligence, when no such expression was found in the

act so amended, should be construed as an expression by the Legislative Body that a change of law was intended. *Brewster* v. *Gage*, 280 U. S. 327, 50 S. Ct. 115, 74 L. Ed. 457."

Counsel for petitioner did not argue in the Court below nor did they intend their argument to imply, as inferred by the Court, that in every case where the doctrine of assumption of risk was formerly applicable there was negligence on the part of the employer. Counsel did argue, and still contend, that the so-called railroad yard cases referred to above are not authority for the contention that no duty or obligation rests upon a railroad to properly illuminate its yards, to maintain lights on shifting cars, to keep a lookout for its employees within the yards, or to warn them of approaching danger and that the failure of the railroad to perform such duties does not constitute negligence.

It is respectfully submitted that the question of the negligence of the employer was not an issue in those cases. The Court below said:

> "Specifically it was held (in the railroad yard cases) that in the movement of cars in a railroad yard by day or by night, a carrier was under no duty or obligation to look out for the employees within the yard or warn them of the approach of cars in the ordinary manner by the blowing of whistles, the ringing of bells or the display of lights or otherwise." (R. 72).

A careful analysis of the entire line of decisions there referred to shows that they rest primarily upon the doctrine of assumption of risk and under that doctrine the employer was not liable regardless of his negligence, for the employee assumed the risk even of such negligence. Specifically it was held that notwithstanding the failure

of the carrier to look out for the employees within the yard and warn them of the approach of cars, the employee could not recover because he had assumed the risk of danger created by the failure of the carrier to furnish him with adequate protection.

It is a fair assumption that the Courts, in those cases, considered that the failure of the railroad to take precautions for the safety of its employees commensurate with the danger that they were likely to encounter, did constitute negligence on the part of the railroad. Otherwise, there would have been no need to invoke the doctrine of assumption of risk, for negligence of the carrier is an essential element of recovery under the Act.

Counsel for the petitioner do not contend that the 1939 amendment to the Act attempts "to raise the standard of care required of a carrier with respect to the safety of its employees in the performance of their duties in railroad yards and other places of danger" (R. 76). The standard is unchanged; it is reasonable care, as it has always been. The difference is, that now, under the amendment, the carrier must use reasonable care to provide for the safety of its employees and when it fails to use reasonable care it can no longer interpose the doctrine of assumption of risk as a shield against the consequences of its neglect.

It is admitted that the 1939 amendment to the Act abolished the doctrine of assumption of risk only in those cases where injury or death resulted in whole or in part from the negligence of the carrier or its officers, agents or employees. The doctrine, however, has been abolished in those cases and if the death in the instant case resulted in whole or in part from the negligence of the respondent, then the respondent is liable in damages to the petitioner for such death. The sole issue, there-

fore, is whether sufficient evidence of negligence on the part of the respondent or its officers, agents or employees, was introduced at the trial of the cause to justify the submission of the case to the jury on the question as to whether the death of employee Tiller resulted in whole or in part from the negligence of the respondent..

**2. Petitioner's evidence of respondent's negligence was more than sufficient to justify submission of question to jury.**

The respondent owed a duty to Tiller in this case to exercise reasonable care to provide him a reasonably safe place of work, which included care in establishing a reasonably safe system or method of work, and he had a right to assume that this would be done. *Chesapeake & O. R. Co.* v. *Proffit,* (1916) 241 U. S. 462, 36 S. Ct. 620, 60 L. Ed. 1102.

The place of work in the instant case was a railroad yard, which under the most favorable conditions is a perilous place of employment. Counsel for the petitioner do not consider superficial, as termed by the court below, the argument that as the doctrine of assumption of risk has been abolished, the carrier can no longer interpose it as a shield against the consequences of its neglect and hence is liable for injuries to its employees in its railroad yards or elsewhere, unless it takes precautions for their safety commensurate with the danger that they are likely to encounter. The carrier is required to exercise reasonable care with respect to the safety of its employees, and a reasonably prudent person, acting reasonably, exercises greater care under conditions

fraught with unusual danger than in ordinary circumstances.

The respondent wholly failed to perform its duty when it assigned Tiller the task of inspecting the seals on its cars, at night, in an unlighted railroad yard with the tracks so close together that it was necessary for him to stand on or near an adjoining track, and, while he was thus engaged, caused one of its engines to push, in a back-up movement, three high gondola cars, without lights, without a lookout and without adequate warning over the track on or near which he was standing, thereby causing his death. An ordinarily perilous place of employment, because of the negligence of the respondent and its employees, became a veritable death trap. A case strikingly in point, in which the court held under similar circumstances that the defendant was guilty of negligence, is *R. & D. R. Co.* v. *Norment,* (1887) 84 Va. 167, 4 S. E. 211. See also *Seaboard A. L. R. Co.* v. *Koennecke,* (1915) 239 U. S. 352, 36 S. Ct. 126, 60 L. Ed. 324; *Clinchfield Coal Corp.* v. *Ray,* (1917) 121 Va. 318, 93 S. E. 601; *C. & O. Ry.* v. *Folkes,* (1942) 179 Va. 60, 18 S. E. (2d) 309.

Many railroad yards are equipped with flood lights; the rules of some railroads require a light on the head car of all back-up movements; the rules of some railroads require the placing of an employee on the head of each back-up movement for the entire length of the movement to serve as a lookout and to give warnings of its approach to employees and others in positions of danger. Had the respondent taken any one of these precautions for the safety of its employees, the death of employee Tiller would not have occurred.

The evidence shows that there were no artificial lights in the yard and that the yard was in total darkness

(R. 24); that the only lights on the front of the back-up movement were a small electric bulb on the tender of the engine, three hopper cars distance from the front end of the movement (R. 50, 51), and a signal lantern in the hands of the brakeman who stepped off the cars before they struck Tiller (R. 21, 53, 54); that the only employee on the head of the back-up movement was the brakeman, who was specifically charged with the duty of signaling the engineer and keeping a lookout for travelers on the public highway which crossed the tracks (R. 51, 53, 54); that he stepped off the car on the opposite side from Tiller before Tiller was struck and that the car passed between him and Tiller immediately after he stepped off (R. 21, 48).

From this evidence the jury might have determined that the failure of the respondent to equip the yard with adequate lighting facilities was negligence; that the failure of the respondent to provide an adequate light on the front end of the back-up movement was negligence; that the failure of the respondent to provide a lookout and adequate warnings for its employees was negligence; and that the death of employee Tiller resulted in whole or in part from such negligence. Certainly the undisputed facts in the case fully justify the submission of the question of negligence to the jury.

In the recent case of *Jacob* v. *New York City,* 315 U. S. 752, 62 S. Ct. 854, decided by this Court March 30, 1942, Mr. Justice Murphy, delivering the opinion of the Court, said:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by

the Constitution or provided by statute, should be jealously guarded by the courts."

To deny petitioner the right to have the jury pass on the question of negligence in this case is to say that under the Federal Employers' Liability Act there is no duty on the carrier to take any precautions for the safety of its employees in a railroad yard and that its failure to do so is not negligence as a matter of law. Such a ruling would completely nullify the August 11, 1939, amendment to the Act insofar as railroad yard cases are concerned.

**3. Respondent was negligent as a matter of law because of its violation of the Federal Boiler Inspection Act and the Rules of the Interstate Commerce Commission adopted pursuant thereto.**

Counsel for the petitioner desire at this time to present to the Court a contention which has not been urged heretofore in these proceedings. They are not unmindful of the rules of the Court, but the contention here advanced is merely an additional argument on the question of negligence which was specifically brought forward by the petition for writ of certiorari. It does not present a new issue but furnishes a new and different approach to the main issue of negligence, upon which petitioner has relied from the institution of this suit.

The Federal Boiler Inspection Act, 45 U. S. C. A., Sec. 22, et seq., was enacted "to promote the safety of employees and travelers upon railroads." Section 2 of the said Act, 45 U. S. C. A. Sec. 23, reads as follows:

"Use of unsafe locomotives and appurtenances unlawful; inspection and tests. It shall be unlawful

for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. (June 7, 1924, c. 355, § 2, 43 Stat. 659.)"

The said law authorizes the Interstate Commerce Commission to prescribe rules and regulations governing locomotives, their equipment, boilers and appurtenances thereto.

In the case of *U. S.* v. *B. & O. Ry. Co.*, (1935) 293 U. S. 454, 55 S. Ct. 268, Mr. Justice Brandeis, delivering the opinion of the Court, says on page 271:

"* * * * * Referring to the argument of the states 'that the authority delegated to the Commission does not extend to ordering the use or installation of equipment of any kind, *Baltimore & Ohio R. R. Co.*, v. *Groeger*, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419,' we said: 'The duty of the Commission is not merely to inspect. It is also to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not 'in proper condition' for operation. Thus the Commission sets the standard. By setting the standard it imposes requirements. The power to require specific devices was exercised before the amendment of 1915, and has been extensively exercised since.' In closing the

opinion, we added: 'If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample.' "

Pursuant to the provisions of the said law, the Interstate Commerce Commission has promulgated and published certain rules and instructions for the inspection and testing of steam locomotives and tenders and their appurtenances. Rules 129 and 131, prescribed by the Commission, which were in full force and effect at the time of employee Tiller's death, read as follows:

"129. (a) *Locomotives used in road service.*—Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight; and such headlight must be maintained in good condition.

(b) Each locomotive used in road service, which is regularly required to run backward for any portion of its trip, except to pick up a detached portion of its train, or in making terminal movements, shall have on its rear a headlight which shall meet the foregoing requirements.

(c) Such headlights shall be provided with a device whereby the light from same may be diminished in yards and at stations or when meeting trains.

(d) When two or more locomotives are used in the same train, the leading locomotive only will be required to display a headlight."

"131. *Locomotives used in yard service.*—Each locomotive used in yard service between sunset and sunrise shall have two lights, one located on the front of the locomotive and one on the rear, each of which shall enable a person in the cab of the locomotive under the conditions, including visual capacity, set forth in rule 129, to see a dark object such as there described for a distance of at least 300 feet ahead and in front of such headlight; and such headlights must be maintained in good condition."

The locomotive which caused the death of employee Tiller was a locomotive used in yard service between sunset and sunrise and was subject to the provisions of Rule 131 of the Commission, *C. & O. Ry. Co.* v. *Wood,* (1932) 6 Cir., 59 F. (2d) 1017. The locomotive, therefore, should have been equipped with lights as prescribed by the said rule, whereas it appears from the evidence that the only light on the rear of the locomotive was a small electric bulb on the top of the tender (R. 50).

Opposing counsel doubtless will argue that even though the locomotive had been equipped with lights in compliance with Rule 131, the rear light would have been obscured by the three cars which it was pushing. Surely it was not the intent of the law or the Commission that the effectiveness of this rule requiring lights for the safety of employees should be nullified by the action of the railroad in obscuring such lights. The Commission has recognized the danger of back-up movements in railroad yards at night and has prescribed as a safety measure that a rear light of certain intensity be maintained on locomotives used in yard service between sunset and sunrise. The railroad cannot refuse to provide such light nor can it adopt a

method of shifting its cars which would obscure such light when provided, and thereby nullify the rule of the Commission. The instant case demonstrates the wisdom of the rule, as its violation by the respondent has resulted in the unnecessary death of one of its employees.

The rule of the Commission has the force and effect of a statutory provision and imposes upon the respondent a mandatory, absolute, unqualified and continuing duty to comply with its requirements. *Southern Ry. Co.*, v. *Lunsford*, (1936) 297 U. S. 398, 56 S. Ct. 504; *Napier* v. *Atlantic Coast Line*, (1926) 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432; *B. & O. Ry. Co.* v. *Groeger*, (1925) 266 U. S. 521, 45 S. Ct. 169; *Chesapeake & O. Ry. Co.* v. *Wood*, (1932) 59 F. (2d) 1017.

In *B. & O. R. Co.* v. *Groeger, supra*, the Court said, on page 528:

> "That Act (the Boiler Inspection Act) was passed to promote the safety of employees and is to be read and applied with the Federal Employers' Liability Act. Under the latter, defendant is liable for any negligence chargeable to it which caused or contributed to cause decedent's death (§ 1); and he will not be held guilty of contributory negligence (§ 3) or to have assumed the risk of his employment (§ 4) if a violation of § 2 of the Boiler Inspection Act contributed to cause his death."

The failure of the respondent to comply with the rule of the Commission and its consequent failure to comply with the provisions of the Boiler Inspection Act, is negligence as a matter of law. This act of negligence unquestionably contributed to employee Tiller's death, for it is fair to assume that if a light on the rear of the backing locomotive had cast its beam at least 300 feet

as required by the rule, the engineer or fireman would have seen Tiller and Tiller would have seen the approaching light. In either event Tiller would have received warning of the approaching cars and his death would have been avoided. The petitioner is entitled, therefore, to a recovery under the Federal Employers' Liability Act.

**4. The unusual movement of the trains in this case renders respondent liable independently of the amendment to the Act.**

In the railroad yard cases, to which reference has heretofore been made, the rule is well recognized that if an employee in a railroad yard is exposed to some unusual danger by reason of an unusual movement of the trains or a departure from the practice generally followed, the employer is in duty bound to give him warning. *Toledo, St. L. & W. R. Co.* v. *Allen,* (1928) 276 U. S. 165; 48 S. Ct. 215; 72 L. Ed. 513.

This rule was followed in the case of *Chesapeake & O. Ry. Co.* v. *Peyton,* (1918) 4 Cir., 253 F. 734, a case similar to the instant case, to which the attention of the Court is particularly directed. In that case it was charged that the railroad changed the operation of its cars on a coal pier from one track to another without giving its employees notice of the change or warning of the approach of the cars, and the Court held:

> "The instructions to the jury on the points really in issue were in strict conformity to the law as we have stated it, and were not inconsistent with each other. In brief, they were as follows: the defendant was under no duty to warn its employees on the pier by bell or whistle of dangers known to them, or to

keep a lookout to protect them against such dangers; but the jury might find negligence from failure to give warning or keep a lookout to protect employees from perils brought upon them by unusual and unexpected action of defendant."

The petitioner introduced ample evidence to show that the back-up movement on slow siding which caused the death of Tiller was an unusual movement, and for that reason he was not looking for the approach of the cars. Wamack, the switchman on the yard testified that the movement was necessary because certain cars had to be reclassified. In other words, certain cars had been erroneously placed in making up the train at Byrd Street Station and this error had to be corrected by changing the position of the cars when the train reached Clopton Yard (R. 19, 20, 36, 37). Certainly, it cannot be true that such errors are customary or usual, for the railroad would not keep a classification employee in its employ if he customarily or usually made such mistakes. The cars were not backed into slow siding unless a reclassification of the cars was required, and the testimony indicates that such a movement was not necessary even when a reclassification was required (R. 52).

Myrick, the engineer on the engine which caused the injury, testified that he had been on this particular assignment about fifty times (R. 28), and that never before in all his experience had he made the back-up movement on slow siding (R. 24). Wright, the fireman on Myrick's engine, had made this particular run fifteen or twenty times and had never made the back-up movement on slow siding. In answer to an inquiry on this question, he stated (R. 58):

"No, sir, I had always got in the clear on the south side."

Dickens, the brakeman on the train, had been on that assignment from twelve to twenty times and "had never been in slow siding before" (R. 49, 51). Although Wamack, the switchman, testified that the movement was not unusual, in his cross-examination he stated:

> "When I dropped off here to make the usual cut of Second 209, I had to hold on to two more cars, being informed by Yardmaster W. J. Jones that we had a classification to make. So instead of making the cut where I was going to make it, I had to drop back two more car lengths." (R. 41.)

It is of particular significance that although Tiller had been on this run for sixteen years, when he regained consciousness after being extricated from the wheels of the car, his first remarks were to ask what hit him and how he got hurt (R. 23), thus clearly indicating that the movement was unusual and unexpected by him. On this issue the case of petitioner is strengthened by the presumption that Tiller in standing on or near the slow siding would look and listen for a train in the direction from which he had reason to expect it. *Chesapeake & O. Ry. Co.* v. *Peyton,* (1918) 4 Cir., 253 F. 734, at 735.

The opinion of Judge Soper in the court below admits that there was some evidence on the part of the petitioner that there was an error in the classification of the cars at Byrd Street, which necessitated the classification at Clopton Yard and that there was also evidence on the part of employees on the cars from Acca Yard that they had not made this particular movement on prior occasions (R. 72). Counsel for the petitioner contend that the evidence was sufficient to justify a reference to the jury on the issue as to whether the movement in question was such as to place the case under the well

recognized exception to the assumption-of-risk doctrine which, even under the old rule existing prior to the 1939 amendment to the Act, required adequate warnings to be given by railroads to their employees and proper lookout to be kept for them in cases of unusual movements in their yards. *Jacob* v. *New York City*, (1942) 315 U. S. 752, 62 S. Ct. 854.

## VII.

## CONCLUSION.

In conclusion, counsel for the petitioner respectfully submit:

1. That under the Federal Employers' Liability Act, as amended on August 11, 1939, the common law doctrine of assumption of risk has no application to this case.

2. That petitioner's evidence of negligence on the part of the respondent was more than sufficient to justify reference of the case to the jury.

3. That the defendant was negligent as a matter of law, which entitles the plaintiff to a recovery under the Act.

4. That independently of the question of the applicability of the doctrine of assumption of risk, the evidence presented by the petitioner was sufficient to justify the submission of the case to the jury on the issue as to whether the movement of the train which caused Tiller's death was so unusual as to require proper lookout for and adequate warning to him.

5. That the Judge of the District Court erred in refusing to submit the case to the jury on the issues of fact and in directing a verdict for the defendant, and that

the United States Circuit Court of Appeals, Fourth Circuit, erred in affirming that action and refusing to remand the case for a new trial.

6. That the decision of the Circuit Court of Appeals should, therefore, be reversed by this Honorable Court and the case remanded for a new trial.

Respectfully submitted,

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